



5001-06-P

DEPARTMENT OF DEFENSE

Defense Acquisition Regulations System

48 CFR Parts 211, 215, 216, 218, and 225

[Docket DARS-2018-0026]

RIN 0750-AJ86

Defense Federal Acquisition Regulation Supplement: Delegation of Special Emergency Procurement Authority (DFARS Case 2018-D024)

AGENCY: Defense Acquisition Regulations System, Department of Defense (DoD).

ACTION: Final rule.

SUMMARY: DoD is amending the Defense Federal Acquisition Regulation Supplement (DFARS) to delegate to the head of the contracting activity the decision authorities provided to the head of the agency by sections of the National Defense Authorization Act for Fiscal Year 2018 that provide new special emergency procurement authorities. This final rule also makes conforming changes to nonstatutory emergency acquisition flexibilities relating to item-unique identification, receipt of only one offer, and limitations on time-and-materials contracts.

DATES: Effective [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER].

FOR FURTHER INFORMATION CONTACT: Ms. Amy Williams, telephone 571-372-6106.

SUPPLEMENTARY INFORMATION:

I. Background

Sections 816 and 164 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2018 (Pub. L. 115-91) add new special emergency procurement authorities to include acquisitions, as determined by the head of the agency, that facilitate defense against or recovery from cyber attack; facilitate the provision of international disaster assistance; or support response to an emergency or major disaster. These sections 816 and 1641 are being implemented in the Federal Acquisition Regulation (FAR) under FAR Case 2018-009.

Prior to this final rule, DFARS 218.271 delegated to the head of the contracting activity the determination authority for application of the previously existing special emergency procurement authorities (support of a contingency operation or to facilitate defense against or recovery from nuclear, biological, chemical, or radiological attack). In addition, the DFARS has provided nonstatutory emergency acquisition flexibilities relating to item-unique identification, receipt of only one offer, and limitations on time-and-materials contracts in circumstances similar to, but somewhat more expansive than those covered by the statutory special emergency procurement authorities.

II. Discussion and Analysis.

This final rule delegates authority to the head of the contracting activity at DFARS 218.271 (redesignated 218.270) whatever special procurement authorities are specified in the FAR. This final rule also makes conforming changes to nonstatutory emergency acquisition flexibilities relating to item-unique identification (DFARS 211.274-2(b)(1)), receipt of only one offer (DFARS 215.371-4(a)(2)), and limitations on time-and-materials contracts (DFARS 216.601(d)(i)(A)(3)) and the associated references in part 218.

However, this final rule does not provide an exception at DFARS 211.274-2(b)(1) to the requirement for item unique identification, for acquisitions that facilitate defense against or recovery from cyber attack, because one of the reasons for use of item-unique identification is to ensure item-level traceability throughout the lifecycle to enhance cyber security (DFARS 211.274-1(e)). Therefore, in order to facilitate defense against or recovery from a cyber attack, item unique identification is particularly required for high-risk items identified by the requiring activity as a target of cyber threats, regardless of dollar value (DFARS 211.274-2(a)(3)(v)).

In addition, the coverage at DFARS 218.270 of the increased simplified acquisition threshold when a humanitarian or peacekeeping operation is declared has been removed from DFARS, because it is now covered in the FAR in the definition of

"simplified acquisition threshold" in FAR 2.101 and at DFARS 218.204.

III. Applicability to Contracts at or Below the Simplified Acquisition Threshold and for Commercial Items, Including Commercially Available Off-the-Shelf Items

This rule does not add any new solicitation provisions or contract clauses. It does add exceptions to the required use of the clause at DFARS 252.211-7003, Item Unique Identification and Valuation. The clause is not required when acquiring items to be used to support a humanitarian or peacekeeping operation or to facilitate the provision of international disaster assistance or to support response to an emergency or major disaster. This clause already applies to the acquisition of commercial items, but this rule will reduce the required usage of the clause.

IV. Publication of this Final Rule for Public Comment Is Not Required by Statute

The statute that applies to the publication of the Federal Acquisition Regulation (FAR) is the Office of Federal Procurement Policy statute (codified at title 41 of the United States Code). Specifically, 41 U.S.C 1707(a)(1) requires that a procurement policy, regulation, procedure or form (including an amendment or modification thereof) must be published for public comment if it relates to the expenditure of appropriated funds, and has either a significant effect beyond the internal

operating procedures of the agency issuing the policy, regulation, procedure or form, or has a significant cost or administrative impact on contractors or offerors. This final rule is not required to be published for public comment, because the rule primarily affects the internal operating procedures of the Government. Specifically, this rule:

- Delegates the special emergency procurement authorities to the head of the contracting activity at DFARS 218.270.
- Makes conforming changes to the exception to the only one offer policy (DFARS 215.371-5) and the exception to the required approval of the determination and findings for time-and-materials or labor-hour contracts (DFARS 216.601(d)(i)(A)(3)) when the acquisition is to facilitate defense against or recovery from a cyber attack, to facilitate the provision of international disaster assistance, or to support response to an emergency or major disaster; and the corresponding references in DFARS part 218 and 225.
- Adds an exception to the policy at DFARS 211.274-2(b)(1) for providing DoD item unique identification when the acquisition is in support of a humanitarian or peacekeeping operation, facilitates the provision of

international disaster assistance, or supports response to an emergency or major

V. Executive Orders 12866 and 13563

Executive Orders (E.O.s) 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This is not a significant regulatory action and, therefore, was not subject to review under section 6(b) of E.O. 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

VI. Executive Order 13771

This rule is not an Executive Order (E.O.) 13771, Reducing Regulation and Controlling Regulatory Costs, regulatory action, because the rule relates to agency organization, management, or personnel.

VII. Regulatory Flexibility Act

Because a notice of proposed rulemaking and an opportunity for public comment are not required to be given for this rule under

41 U.S.C. 1707(a)(1) (see section VI. of this preamble), the analytical requirements of the Regulatory Flexibility Act (5 U.S.C. 601 et seq.) are not applicable. Accordingly, no regulatory flexibility analysis is required and none has been prepared.

VIII. Paperwork Reduction Act

The rule will result in a de minimis reduction of burden hours through slight reduction in use of DFARS clause 252.211-7003. When contractors utilize Wide Area Workflow in accordance with DFARS 252.232-7003 and Appendix F, the item unique identification information required by DFARS 252.211-7003 is automatically transmitted to the IUID Registry. The burden imposed by DFARS 252.211-7003 is approved by the Office of Management and Budget under OMB clearance 0704-0248, Appendix F, Inspection and Receiving, in accordance with the Paperwork Reduction Act (44 U.S.C. chapter 35).

List of Subjects in 48 CFR Parts 211, 215, 216, 218, and 225

Government procurement.

Amy G. Williams,

Deputy, Editor, Defense Acquisition Regulations System.

Therefore, 48 CFR parts 211, 215, 216, 218, and 225 are amended as follows:

1. The authority citation for parts 211, 215, 216, 218, and 225 continues to read as follows:

Authority: 41 U.S.C. 1303 and 48 CFR chapter 1.

PART 211—DESCRIBING AGENCY NEEDS

2. In section 211.274-2, revise paragraph (b) (1) to read as follows:

211.274-2 Policy for item unique identification.

* * * * *

(b) * * *

(1) The items, as determined by the head of the contracting activity, are to be used to support a contingency or humanitarian or peacekeeping operation; to facilitate defense against or recovery from nuclear, biological, chemical, or radiological attack; to facilitate the provision of international disaster assistance; or to support response to an emergency or major disaster; or

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PART 215—CONTRACTING BY NEGOTIATION

3. In section 215.371-4, revise paragraph (a) (2) to read as follows:

215.371-4 Exceptions.

(a) * * *

(2) Acquisitions, as determined by the head of the contracting activity, in support of contingency or humanitarian

or peacekeeping operations; to facilitate defense against or recovery from cyber, nuclear, biological, chemical, or radiological attack; to facilitate the provision of international disaster assistance; or to support response to an emergency or major disaster;

* * * * *

PART 216—TYPES OF CONTRACTS

4. In section 216.601, revise paragraph (d) (i) (A) (3) to read as follows:

216.601 Time-and-materials contracts.

(d) * * *

(i) * * *

(A) * * *

(3) Exception. The approval requirements in paragraphs (d) (i) (A) (1) and (2) of this section do not apply to contracts that, as determined by the head of the contracting activity—

(i) Support contingency or humanitarian or peacekeeping operations;

(ii) Facilitate defense against or recovery from conventional, cyber, nuclear, biological, chemical or radiological attack;

(iii) Facilitate the provision of international disaster assistance; or

(iv) Support response to an emergency or major disaster.

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PART 218—EMERGENCY ACQUISITIONS

5. Amend section 218.201 by—

- a. In paragraph (2), removing “agency” and adding “contracting activity” in its place;
- b. Redesignating paragraphs (7) through (10) as paragraphs (9) through (12), respectively; and
- c. Adding new paragraphs (7) and (8) to read as follows:

218.201 Contingency operation.

* * * * *

(7) Only one offer. The requirements at sections 215.371-2 do not apply to acquisitions, as determined by the head of the contracting activity, in support of a contingency operation. See 215.371-4(a)(2).

(8) Approval of determination and findings for time-and-materials or labor-hour contracts. The approval requirements in paragraphs (d)(i)(A)(1) and (2) of this section do not apply to contracts that, as determined by the head of the contracting activity, support contingency. See 216.601(d)(3).

* * * * *

6. Revise section 218.202 to read as follows:

218.202 Defense or recovery from certain events.

For acquisitions that, as determined by the head of the contracting activity, are to facilitate defense against or

recovery from cyber, nuclear, biological, chemical, or radiological attack; to facilitate provision of international disaster assistance; or to support response to an emergency or major disaster, the following requirements do not apply:

- (1) Policy for unique item identification at 211.274-2(a).

Contractors are not required to provide DoD unique item identification if the items are to be used to facilitate defense against or recovery from nuclear, biological, chemical, or radiological attack. However, contractors are not exempt from this requirement if the items are to be used to facilitate defense against or recovery from cyber attack. See 211.274-2(b).

- (2) Only one offer requirements at section 215.371-2. See 215.371-4(a)(2).

- (3) Approval of determination and findings for time-and-materials or labor-hour contracts at 216.601(d)(i)(A)(1) and (2). See 216.601(d)(3).

7. Add section 218.204 to read as follows:

218.204 Humanitarian or peacekeeping operation.

The following requirements do not apply to acquisitions that, as determined by the head of the contracting activity, are in support of humanitarian or peacekeeping operations:

- (1) Policy for item unique identification at 211.274-2(a).

See 211.274-2(b).

(2) Only one offer requirements at sections 215.371-2. See 215.371-4(a)(2).

(3) Approval of determination and findings for time-and-materials or labor-hour contracts at 216.601(d)(i)(A)(1) and (2). See 216.601(d)(3).

218.270 [Removed]

8. Remove section 218.270.

218.271 [Redesignated as 218.270]

9 Redesignate section 218.271 as section 218.270 and revise the introductory text and paragraph (a) to read as follows:

218.270 Head of contracting activity determinations.

The term "head of the agency" is replaced with "head of the contracting activity," as defined in FAR 2.101, in the following locations:

(a) FAR 2.101: definition of "simplified acquisition threshold."

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218.272 [Redesignated as 218.271 and Amended]

10. Redesignate section 218.272 as section 218.271 and remove "PGI 218.272" and add "PGI 218.271" in its place.

PART 225—FOREIGN ACQUISITION

225.374 [Amended]

11. Amend section 225.374 by removing "See 218.272" and adding "See 218.271" in its place.

